The State of Daddy Issues

I realize that I am pregnant, and I have to tell my spouse.

This is my reoccurring nightmare.

Nature has a longstanding tradition of cuckolding, in which the female fools her mate into providing for the offspring of another man. Ethics aside, even in my wildest dreams this is not an option; I am married to a *very* smart woman.

In this nightmare my freefalling feeling of terror starts with the panic of having to reveal my failing to my spouse; I slide into the claustrophobic panic of having tied together forever myself, my child, my spouse, and some random guy; and then I wake up, heart pounding.

I wonder if William Marotta wakes up in a panic, heart pounding, the financial obligations that anchor him to his daughter giving him a sinking feeling. In all honesty, I hope so. There's power in an object lesson, and we'll be paying for this failing with greater frequency unless we get our state lawmakers and courts to do the right thing.

Three years ago, Angela Bauer and Jennifer Schreiner placed an advertisement on Craigslist looking for someone to donate sperm, and William Marotta obliged. These three adults privately agreed that William would walk away with no obligation to support the child and no right to parent the child; the two women would share the responsibility to provide for and the right to raise the child. They signed a contract to this effect.

Jennifer gave birth to a baby girl who is William's biological daughter. From the news reports I gather that Angela has not adopted the little girl, who is now three years old.

At the time they struck this deal, Angela and Jennifer had been together for eight years and had adopted children together. In a traditional division of labor, Angela worked outside the home while Jennifer worked as a SAHM. Like many families, Angela and Jennifer have since separated but still parent together.

Now Angela has an illness that prevents her from working. Jennifer turned to the Kansas Department of Children and Families (DCF) to get health insurance for the daughter William fathered. DCF is required by law to establish paternity and pursue child support from the noncustodial parent, in this case William. DCF demanded that Jennifer provide the name of the "sperm donor" as a condition for the state to provide health insurance.

William has spent over $10,000 and 10% of his income in legal fees to fight the state's pursuit for child support. He has filed a motion to have the case dismissed, and the hearing is January 8th in Shawnee County District Court. He said DCF's pursuit of child support from him, rather than from Angela, is a political move in a "Republican state." He said he's not surprised by the national media attention his case is receiving, because "it combines the social issues of same-sex couples, adoptions and sperm donor rights … [i]ssues that to me, being left of center, are something that I am kind of involved with and interested in."

Here's what's weird. The Kansas legislature recently passed statute 23-2208(f), which allows parents to contract away the rights of a child before the child is born if the child is conceived, by a woman who is not the sperm donor's wife, through artificial insemination with the assistance of a physician.

William and Jennifer did not use a physician's services. William's biological relationship to his offspring and the legal technicality allow DCF to pursue William to pay for the financial support his biological daughter needs.

Here's what stinks: If William and Jennifer had conceived with the assistance of a physician, then DCF would not be able to sue William for child support.

Here's the reason why that stinks: When the Kansas legislature enacted statute 23-2208(f), it turned a group of children into second class citizens by unilaterally stripping them of the right to be supported by their natural family because of how they were conceived.

Here's where I stand on my soapbox as a loving gay woman and an attorney to declare: this is not a gay-parenting issue. This is not a contract issue. This is a civil rights issue. Laws like Kansas statue 23-2208(f) deprive children of their right to due process protection under the law.

The Fifth Amendment of the United States Constitution, in a portion known as "the takings clause" declares, "*No person shall be… deprived of …liberty, or property, without due process of law…*" The Fourteenth Amendment provides what is known as the Due Process Clause, which Wikipedia succinctly explains: "where an individual is facing a deprivation of life, liberty, or property, procedural due process mandates that he or she is entitled to adequate notice, a hearing, and a neutral judge."

Children have a liberty right to a relationship with biological family, and a property right in the financial support that children often receive from family members.

The American Academy of Adoption Attorneys notes:

> It has long been recognized that children are persons with rights protected by the United States Constitution. In re Gault, 387 U.S. 1, 13 (1967) (stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). The realm of personal family life is a fundamental interest protected by the Fourteenth Amendment to the United States Constitution. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (there is an "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987) (stating that a child's interest in continued companionship and society of parents is a cognizable liberty interest); Spielman v. Hildebrand, 873 F.2d 1377 (10th Cir. 1989) (adoptive parents, like biological parents, have a fundamental liberty interest in the familial relation). This fundamental right belonging to both parents and children also has been explicitly recognized by

> states other than California. See, e.g., Reist v. Bay Circuit Judge, 241 N.W.2d 55, 62 (Mich. 1976) (holding that the rights of parent and child in their "fundamental human relationship" are encompassed within the term "liberty"); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981) (recognizing liberty interest in mutual relationship between child and parent). (Some citations omitted.)

It has been an established norm that the government will not randomly or impersonally deny a child's right to receive support from her biological family.

Certainly there are times when it is in a child's best interests to sever ties with biological family, as with adoption. But the court does not sever the child's right to relationship with and support from the people whom are her biological roots without first providing the protection known as "due process."

Although laws vary by state, children who are adopted have the rights and responsibilities of a parent severed only after legal proceedings regarding what is in the child's best interests. The Legal Information Institute of Cornell University School of Law notes:

> [An] individual cannot petition for adoption unless the court makes an official finding that the individual is "acceptable" as an adoptive parent. Before an adoption becomes official, the court must pass upon an investigatory report submitted by the state agency that the individual qualifies as "acceptably suitable" for becoming an adoptive parent. These investigatory reports are tremendously detailed, including the petitioners' religious backgrounds, social history, financial status, moral fitness, mental and physical fitness, and criminal background. After weighing the factors, the agency makes a recommendation, which the court can accept or reject, with the court basing its decision on serving the best interests and welfare of the child.

Key to this process is that the court considers the needs of the child. In contrast, a statute that denies an entire group of people of their liberty and property rights before they are born, and a contract that signs away the rights of a child who has not been born, cannot truly be determinative of what is in the best interests of someone who does not yet exist but who will later sink or float under the weight of these legal entanglements.

I hope that Kansas DCF wins the court case to collect child support from William, rather than leaving the people of Kansas to foot the bill for his foolishness.

The next step is to have the good people of Kansas ask their legislators to amend 23-2208 to remove section (f), which strips a child of the right to be supported by a biological parent without the due process protections afforded to children who are adopted and to other U.S. citizens.

***Afterword*:**

This piece builds on a prior work, Who's Your Daddy, in which I deconstructed the Pennsylvania case, **Ferguson** v. **McKiernan**, 940 A. 2d 1236 (Pa. 2007) to see how courts of law construct meaning. The case came to my attention when I had the privilege of skimming the finished draft at the end of the day during a summer clerkship at the office of the esteemed Justice Max Baer. I had been eager to intern with his office in no small part because of the excellent writing that has come from his chambers as well as his unwavering advocacy for children.

It was not until the end of my third year of law school that I had the opportunity to read the case in earnest, in a class taught by the legendary Jan Broekman with Professors William Butler, Jay Mootz, and William Pancek.

I spent a semester delving into the case to see how the court determined which meanings and values to apply in thinking through the case and arriving at a well-reasoned conclusion. The opinion was skillfully written and worth the time it took to examine closely.

When I chose to study this case I mistakenly presumed that because I support both adoption and same-sex marriage, I would therefore concur with the reasoning and conclusion of the court. I was surprised to conclude that the dissenting opinion is genuinely more in line with the Pennsylvania rules of statutory construction and prevailing public policy. As one law office* put it, "significant public policy in favor of supporting a child is overcome when the sperm contract relieves a known father of paying support."

It was not until I thought about the present case in Kansas that I was able to take a look at the bigger picture and see the constitutional legal framework that cases such as the one in Pennsylvania and Kansas err in falling outside of. Children have a Fifth amendment right to relationships with biological family and to financial support from that family, and a Fourteenth Amendment right not to be deprived of those rights without due process. Courts deny children due process when they enforce the contracts that were used to deny the liberty and property rights of someone who had not been born at the time the contract was entered into, without an investigation and hearing into the child's best interests.

Last but not least, this essay would not have been possible without the assistance Professor Robert E. Rains provided on that first paper. While teaching juvenile law and directing a legal clinic, he also served as a member of the International Society of Family Law. In my time as a law school student and the president of the school's LGBT organization, I came to respect Professor Rains for his commitment to integrity over convenience, for his ardent advocacy for children's rights, and for his demonstrated expert knowledge of legal issues that either directly or indirectly relate to sexual orientation or gender identity.

When I needed a sounding board to think my way through the legal analysis, Professor Rains was generous with his time and constructive listening. When I went beyond the case at hand to speculate about related issues that might confound courts at this point in history, Professor Rains

allowed me to read drafts of his own writing so that I could see the issues unfolding in other jurisdictions. This proved to be an immeasurably helpful boost to writing a well-supported line of thinking, and also gave a shot of confidence to a budding attorney.

For his integrity, for his generosity with his time and expertise, and for what it made possible then and now, I am ever grateful to Professor Robert Rains.

Whatever errors in reasoning there may be in the original paper or the ones I've written on its shoulders, are my own.

*I took this quote from a newsletter, The Matrimonial Strategist, written by attorney Mary Cushing Doherty of the law firm High Swartz. In the interest of full disclosure, I had the honor of interning at the firm back in 1991, when it was known as High Swartz Roberts & Seidel. Although I remain in contact with an attorney who formerly worked at the firm and who moonlighted as a coach for our high school's mock trial team, I have no affiliation with this firm and was not aware of where the article came from until after I read it.